Nos. 86-495, 86-624 and 86-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

K MART CORPORATION,
Petitioner
v.
CARTIER, INC., *et al.*

47TH STREET PHOTO, INC.,
Petitioner
v.
COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, *et al.*

UNITED STATES OF AMERICA, *et al.*,
Petitioners
v.
COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER 47TH STREET PHOTO, INC.

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INTRODUCTION

The legal position that emerges from the briefs of COPIAT and its cadre of *amici* [1] is stark: If a corpo-

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[1] The array of COPIAT's *amici* is designed to convey the impression that the issue in this case concerns American manufacturers more than foreign manufacturers. That is simply untrue. Indeed, the study by Lexecon Inc. that was sponsored by COPIAT and relied upon in COPIAT's discussion of parallel importation

ration incorporated in the United States is the registered owner of trademark rights under American law, even if it is a shell wholly owned by a foreign manufacturer who controls the trademark elsewhere in the world, Section 526 gives the foreign manufacturer, through its subsidiary, the statutory power to exclude from the United States authentic trademarked goods manufactured abroad. In other words, COPIAT maintains that legal form, rather than substance, is the only standard that Congress prescribed in 1922, and legal form, not substance, is the sole standard that governs this Court's decision 65 years later.

We detail below some of the many reasons why COPIAT's legal arguments are erroneous. But we begin by noting that COPIAT's sacrifice of substance to form belittles both Congress and the Court. The plain meaning doctrine does not mean that the purpose and intention of Congress are to be ignored or that words are to be read devoid of their context. The Congress that enacted Section 526 plainly wanted to deny to foreign corporations the statutory right to control the flow of their own merchandise into the United States. But, according to COPIAT, Congress' deliberate judgment may be ignored if a wholly owned American subsidiary is established to hold legal title to American trademark rights. If COPIAT is right, the 1922 Congress labored to create a distinction—*i.e.*, between foreign and American corporations—which makes no practical difference.

This Court cannot read Section 526 as COPIAT would read it without obliterating Congress' directive that a foreign corporation have no right to exclude its own

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(COPIAT Br. 5, n.5) states on page 2 that "[m]ost COPIAT members are U.S. subsidiaries of foreign manufacturers." This was the understanding of the court below. 790 F.2d 903, 904. *Amicus* Lever Brothers, for example, initially calls itself "the American manufacturer of quality trademarked merchandise," but acknowledges in its brief that it is a wholly owned subsidiary of a Dutch company that controls worldwide distribution of its products. Lever Bros. Br. 2-3, 5-6.

merchandise and that only an American corporation be given that right. To accept COPIAT's argument, the Court would also have to ignore what has been happening in international commerce over the past half century—and particularly over the most recent decade and a half. Parallel imports have been permitted into the United States—as they have been permitted into virtually all economically developed countries—since at least 1972.[2] Patterns of international trade in consumer goods have developed on the basis of this policy. Investments have been made and expectations have been created. If the *status quo* is to be altered, Congress should make the change, not this Court.

ARGUMENT

I. SECTION 526 IS NOT CLEAR.

COPIAT states time and again that Section 526 "is clear," that it has a "natural meaning," and that the principles governing "unambiguous" terms of a statute apply here. In view of the overwhelming evidence of contrary administrative practice and of Congress' ratification of that practice, it is not surprising that COPIAT seeks refuge in its own preferred construction of the statutory language. But the statute does not become clear simply because COPIAT repeatedly calls it clear. The only clear aspect of the statute is its application to independent American purchasers of foreign trademarks. The question posed by COPIAT is whether the statutory language includes the much broader category of U.S. distributors of foreign-manufactured goods.

Because the key words of the statute have been given various meanings depending upon their context, the plain meaning of the statute cannot be determined without reference to congressional intent. The meaning that

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[2] We maintain that this has been true since 1922, and demonstrably since the 1930's. 47th St. Photo Br. 30-36. But even if COPIAT's broadest assertions are accepted as true, the Customs Service regulation that was challenged in its 1984 lawsuit was promulgated in 1972.

STATEMENT OF THE CASE

The law and policy of the U.S. government have permitted parallel importation for more than half a century. Customs Service regulations, based upon the Tariff Act of 1922 and the Tariff Act of 1930, 19 U.S.C. 1526, have permitted parallel importation only under specific, narrowly defined circumstances. The current regulation, in place since 1972, permits parallel importation only when the foreign and U.S. trademark holders are (1) the same company or (2) under common ownership or control, or (3) where the U.S. trademark owner has authorized the placing of the mark on the product. 19 C.F.R. 133.21(c). In these cases, the regulation does not permit a trademark holder to block the entry of parallel imports.

The courts have also long upheld parallel importation despite numerous challenges under trademark and tariff laws.[3] In fact, the court of appeals below is the first court ever to hold that Section 526 of the Tariff Act of 1930, 19 U.S.C. 1526, requires the exclusion of all parallel imports.

The respondents commenced this action before the district court, seeking declaratory and injunctive relief, based on their claim that the Customs regulation was inconsistent with the Tariff Acts of 1922 and 1930 and the Lanham Trademark Act of 1946, 15 U.S.C. 1124. *Coalition to Preserve the Integrity of American Trademarks v. United States,* 598 F. Supp. 844 (D.D.C. 1984). The district court rejected the respondents' claim and upheld the validity of the regulation. The district court found that the Customs Service's long-standing inter-

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[3] *See Bell and Howell: Mamiya Co. v. Masel Supply Co.,* 719 F.2d 42 (2d Cir. 1983), *vacating and remanding,* 548 F. Supp. 1068 (E.D.N.Y. 1982); *Monte Carlo Shirt, Inc. v. Daewoo International (America) Corp.,* 707 F.2d 1054 (9th Cir. 1983); *Lever Brothers Co. v. United States,* No. 86-3151 (D.D.C. Jan. 21, 1987) (order denying preliminary injunction); *Diamond Supply Co. v. Prudential Paper Products Co.,* 589 F. Supp 470 (S.D.N.Y. 1984); *El Greco Leather Products Co. v. Shoe World, Inc.,* 599 F. Supp. 1380 (E.D.N.Y. 1984), *rev'd on other grounds,* _____ F.2d _____ (2d Cir. 1986); *Parfums Stern, Inc. v. United States,* 575 F. Supp. 416 (S.D. Fla. 1983); *United States v. Guerlain,* 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated and remanded,* 358 U.S. 915 (1958), *dismissed,* 172 F. Supp. 107 (S.D.N.Y. 1959).

pretation of Section 526 of the Tariff Act was reasonable and supported by legislative history, judicial decisions, and legislative acquiescence. *Id.* at 852.

On appeal, the court below reversed the district court on the ground that the Customs Service regulation is inconsistent with Section 526 of the Tariff Act and therefore invalid. *Coalition to Preserve the Integrity of American Trademarks v. United States,* 790 F.2d 903, 913 (D.C. Cir. 1986). Rejecting the reasoning of the district court in this case and of the U.S. Court of International Trade and the Court of Appeals for the Federal Circuit, both of which had upheld the Customs regulation in the *Vivitar* case, the court below held that Section 526 requires the exclusion of all parallel imports regardless of the relationship between the foreign and U.S. trademark holders.[4] Soon after the decision below, another court of appeals also upheld the regulations. *Olympus v. United States,* 792 F.2d 315 (2d Cir. 1986).[5] This was argued to the court below in a motion for rehearing by the petitioners, but the court below nonetheless denied rehearing.

ARGUMENT

The American Free Trade Association wholeheartedly agrees with the petitioners that the court of appeals below erred in overturning the Customs regulation. The petitioners' arguments persuasively demonstrate three grounds for upholding the regulation. First, the Customs Service regulation is required by the legislative intent behind Section 526, given the circumstances of its enactment, and at the very least is a reasonable exercise of the agency's enforcement discretion. Second, Customs' consistent and longstanding enforcement of its regulation, in substantially the same form for fifty years, legitimates the agency's interpretation of Section 526. Finally, decades of Congressional acquiescence to and re-affirmation of the regu-

[4] However, the court of appeals denied respondents' demand for a permanent injunction (*id.* at 918), and upon motion of petitioners United States of America and K mart, the court of appeals also stayed issuance of its mandate pending the filing of petitions for certiorari to this Court.

[5] *See also Lever Brothers, supra* n. 3 (district court finds Customs Service regulation to be a reasonable exercise of Agency's enforcement discretion).

lation indicate Congress' acceptance of the Customs Service interpretation of Section 526 and deference to Customs' expertise.

Given the exhaustive legislative history and in-depth analysis of the case law presented below, which undoubtedly will be addressed again by the parties before this Court, it is unnecessary for AFTA to review these issues in great detail for the Court. However, the court of appeals' decision contains a number of deficiencies which AFTA seeks to emphasize to this Court. Furthermore, the Customs regulation protects vital First Amendment concerns which, though not raised by the petitioners nor addressed by the court below, have been raised by AFTA and merit consideration.

A. The Court Of Appeals Decision Misconstrues The Legislative Intent Behind Section 526

The first shortcoming of the court of appeals' decision below is its distorted analysis of, and the erroneous conclusions that it draws from, the legislative history behind Section 526. According to the court, "our review of the circumstances prompting the enactment of Section 526 and its legislative history persuade [sic] us that the statute embodies a purpose as sweeping as the terms its drafters employed." 790 F.2d at 909. By selecting isolated portions of the Floor debate, the court creates the impression that Congress intended a broad application of Section 526. However, the petitioners have demonstrated extensive support from the legislative history for Customs' interpretation of the statute. There is more than enough evidence in the record to conclude that Congress intended to limit the scope of Section 526 to protect only independent U.S. trademark holders. Accordingly, Customs' regulation is not only reasonable, it is a necessary interpretation of Congress' intent for Section 526, given the circumstances surrounding its enactment.

At the very least, analysis of the legislative history demonstrates that the Congressional intent as to the scope of Section 526 is unclear, despite the confident assessment of the court below that the legislative purpose is evident. The debate

surrounding the bill was brief, approximately ten minutes long, and raises substantial doubt about whether many legislators understood the ramifications of the proposed statute. However, the one conclusion that is clear, and the one that the court of appeals' decision largely ignores, is the fact that Section 526 was enacted by Congress primarily to reverse the Second Circuit's decision in *A. Bourjois & Co. v. Katzel*, 275 F. 539 (2d Cir. 1921).[6]

In *Katzel*, an independent American company purchased all the U.S. rights to a trademark for a facepowder from the French manufacturer and trademark holder, for what was at that time an enormous sum of money. After the American company had developed extensive goodwill in this country as the source of the product, the French manufacturer sold the facepowder to another American company, which then imported the product into the United States and sold it under the identical trademark. The first American company sued the second for trademark infringement, and the Second Circuit held that the U.S. trademark owner had no cause of action against the unauthorized importation of genuine trademarked goods. 275 F. at 543.

Congress promptly enacted Section 526 in order to reverse the Second Circuit's decision and protect American trademark holders against the circumstances which had occurred in the *Katzel* case, essentially a fraud perpetrated by the foreign trademark holder against the independent U.S. company to which it had sold all its U.S. rights to the trademark. However, the facts of *Katzel* do not conflict with the regulation at issue in this case. *Katzel* did not involve the situation in which the U.S. trademark holder and the foreign trademark holder are related parties. In the latter situation, the risk of fraud upon the U.S. trademark holder by the foreign trademark holder is nonexistent, and there is no need for the trademark protection urged by the respondents. Ignoring this crucial impetus for the statute and the numerous statements in the record supporting Customs' interpretation, the court below instead strings together isolated portions from the Floor debate and concludes that Congress intended the sweeping and unnecessary application of Section 526.

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[6] *Katzel* was subsequently reversed by the Supreme Court after Congress enacted Section 526. *A. Bourjois & Co. v. Katzel*, 260 U.S. 689 (1923).

Moreover, the court of appeals decision leads to absurd results. The decision, if left standing, would give greater protection to the U.S. affiliates of foreign manufacturers than American companies receive in foreign markets overseas and would reward American companies who move their manufacturing facilities overseas to take advantage of Section 526, thereby depriving American citizens of jobs. The court's decision would also favor foreign conglomerates over a substantial and growing U.S. industry of importers and retailers of parallel goods and would deprive American consumers of billions of dollars in savings on genuine, foreignmade goods. These are not, contrary to the opinion of the court below, results which only the Congress should address.

The Court should also note that, given the protectionist fervor sweeping Congress in the 1920's and 1930's, it is highly unlikely that Congress intended to be so generous to foreign conglomerates. Moreover, since parallel importation was not widely known during the 1920's and 1930's and since multinational companies were far less common than today, it is also unlikely that Congress even considered these ramifications. Since the legislative history behind Section 526 contains substantial support for Customs' regulation, or at the very least, shows that Congress' intent was ambiguous, Customs' regulation is a reasonable interpretation of the statute.

B. Congressional Acquiescence To Customs' Enforcement Constitutes Tacit Approval Of The Regulation

For fifty years, Congress has been aware of Customs' enforcement of Section 526 and has left the Customs regulation undisturbed. Nevertheless the court of appeals rejected the petitioners' argument, which was adopted by both the *Vivitar* and *Olympus* courts, that Congress has acquiesced in the Custom Service's consistent and longstanding interpretation of Section 526. Instead, the court finds that "the Framers deliberately made the passage of legislation difficult" and therefore concludes that Congress' inaction signifies nothing. 790 F.2d at 917. The court's conclusion was in error.

Congress has revised Section 526 on numerous occasions in the last fifty years. Each time, although aware of Customs'

interpretation of the statute, Congress has not altered the statute to overturn the Customs regulation nor expressed displeasure with Customs' enforcement of the statute. In 1954, for example, when considering amendments to Section 526, Congress was informed that the Customs Service permitted parallel importation. Congress specifically noted Customs' practice and amended other provisions of Section 526, yet chose not to revise the statute to prohibit parallel importation. *See Registration and Protection of Trade-marks: Hearing on S. 2540 Before a Subcommittee of the Senate Committee on the Judiciary,* 83rd Cong., 2d Sess. 96 (1954) (letter of Thurston B. Morton, Assistant Secretary of State.)

More than two decades later, in connection with amendments to Section 526 in the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, Section 211, 92 Stat. 888, 903, the House Ways and Means Committee expressly recognized Customs' longstanding regulations permitting parallel importation. H.R. Rep. No. 621, 95th Cong., 1st Sess. 27 (1977). Again, Congress left Customs' regulation in place. These instances demonstrate that Customs' enforcement of Section 526 has not contravened Congress' intent and, in fact, has been supported by the Congress. *See Haig v. Agee,* 453 U.S. 280, 297-298 (1981) (where Congress acts in related area with awareness of and no evidence of intent to repudiate longstanding administrative construction, Congress is read to have adopted that interpretation); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969); *Grocery Manufacturers of America, Inc. v. Gerace,* 755 F.2d 993, 1000 (2d Cir.), *cert. denied,* 106 S. Ct. 69 (1985).

Moreover, the evidence of continued Congressional intent is not merely negative, it is also positive. Congress has in three recent instances expressly demonstrated its support for parallel importation. Since parallel importation is made possible only by the Customs regulation at issue here, these instances represent direct Congressional support for the regulation.

The first recent instance occurred during Congressional consideration of the Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, Chap XV, 98 Stat. 2178. While parallel imports are genuine trademarked articles and not counterfeits,

opponents of parallel imports have often tried to confuse the issue by blurring the distinction. Nevertheless, during debate on the 1984 Act, a joint statement was made by the Senate and House managers of the bill which explicitly distinguished parallel imports from counterfeits:

> The term "counterfeit mark" in this bill also excludes the marks on so called "parallel imports" or "gray market" goods—that is, trademarked goods legitimately manufactured and sold overseas and then imported into the United States outside the trademark owner's desired distribution channels. . . . Current Treasury Department regulations permit the importation of such goods when the foreign and domestic owners of the trademark are under common ownership and control. . . . This regulation is now being challenged in the courts. . . . Regardless of the status of "parallel imports" or "gray market" goods under the Treasury regulations, however, the sponsors do not consider the goods to bear "counterfeit marks" for purposes of this legislation, since the marks on these goods are placed there with the consent of the trademark owner or of a person affiliated with the trademark owner.

130 Cong. Rec. H12076, 12079 (daily ed. October 10, 1984) (Joint Statement of Rep. Hughes and Sen. Mathias) (citations omitted). This language clearly constitutes Congressional awareness and approval of parallel importation and, therefore, by implication, of the long-standing Customs regulation which makes parallel importation possible.

In a second recent instance, the House of Representatives voted overwhelmingly to remove the Mrazek amendment from the 1986 Omnibus Appropriations Continuing Resolution which—under the guise of health and safety—would have ended the parallel importation of wine and liquor. 132 Cong. Rec. H11080 (daily ed. October 15, 1986). The amendment would have required all imported wine and liquor to be accompanied by the manufacturer's certification of ingredients and methods of production. *Id.* (statement of Rep. Mrazek). Because manufacturers would have provided this information

only to "authorized" importers of these products, parallel importation of wines and liquors would have been effectively banned by the amendment. *Id.* at 11082 (statement of Rep. Frenzel). The amendment was inserted in the Continuing Resolution during House Appropriations Committee markup without debate. During House-Senate Conference Committee consideration of the resolution, the Senate members voted to reject it.

Opponents of the amendment pointed out that it was really a ruse to end parallel importation and thus to obtain a monopoly for "authorized" importers. If the amendment's sponsors were truly interested in safety, the opponents argued, they would join with parallel importers who support independent laboratory testing, which is a more effective method of ensuring that imported food products meet United States health and safety standards. *Id.* at 11083 (statement of Rep. Gray).

During the subsequent debate on the removal of the amendment, numerous Congressmen expressed their strong support for parallel importation. For example, Representative Frenzel, a ranking member of the Ways & Means Committee, which has jurisdiction over the Tariff Act, stated:

> There are parallel importers who are now offering a better price for consumers of imported beverages. There are State-owned liquor stores who are seeking to save State funds by purchasing parallel imports. It gives them a better markup. These people are providing some competition to those authorized dealers who would otherwise have a monopoly, and would under the Mrazek amendment have a monopoly of sales of these items in the United States.
>
> . . . .
>
> I believe that in prohibiting parallel imports we would create a precedent that would aid those who are attempting to eliminate all parallel imports in the future. I am sure that that is a precedent that most of us do not want. Gray market purchases have not caused substantial business losses for authorized

> dealers. They have given many consumers an opportunity to purchase goods that they would not otherwise be able to purchase.

Id. at 11082.

Later on in the debate, Representative Gray, Chairman of the House Budget Committee, stated:

> The fact is, Mr. Speaker, that this a provision to establish a monopoly, plain and simple. It has absolutely no impact on health or safety. It would effectively prohibit any importer other than the manufacturers exclusive representative from selling distilled spirits in the United States.
>
> . . .
>
> This amendment also has the potential of setting a very dangerous precedent by protecting a certain class of manufacturers and importers, where in fact we do not treat others, most notably in the area of sporting goods, electronic items, and literally millions of dollars in other imported items.

Id. at 1083.

Following the extensive debate on the House Floor, the House of Representatives rejected the amendment by the overwhelming vote of 297 to 113. *Id.* at 11085.

Thus, both the Senate—whose members rejected the amendment during the Conference Committee deliberations—and the House of Representatives—which subsequently voted overwhelmingly to remove the amendment—refused to permit "authorized" importers to create a monopoly on the importation of wine and liquor. By rejecting the Mrazek amendment, Congress demonstrated its support for parallel importation.

In another instance last year, both the House and Senate approved legislation regulating, yet still permitting, the parallel importation of foreign-manufactured automobiles. National Highway Traffic Safety Administration Act of 1985, S. 863, 99th Cong., 2d Sess., 132 Cong. Rec. S6097 (daily ed. May 15,

1986); H.R. 2248, 99th Cong., 2d Sess., 132 Cong. Rec. H9238 (daily ed. October 6, 1986). The legislation was designed to ensure that all gray market automobiles imported into the United States comply with U.S. safety and emission standards. Although the legislation passed by both Houses was substantially the same on the gray market issue, the differences between the bills were never resolved in Conference Committee, and the legislation has not yet been enacted into law. Nevertheless, in this instance, as in the two other contemporary instances, Congress expressly demonstrated its continued intent that parallel importation should remain a legal channel of free trade and, therefore, that the Customs regulation which makes parallel importation possible should continue in force as well.

C. The Customs Regulation Is A Reasonable Effectuation of the Tariff Act Because It Promotes Important First Amendment Values

Finally, the regulation at issue here is a reasonable interpretation of Section 526 because it promotes vital First Amendment concerns. If Section 526 is accorded the sweeping scope urged by the respondents and approved by the court of appeals below, truthful commercial speech (*i.e.*, the trademark applied to the goods) attesting to the source of the goods, will be unnecessarily restricted. Because the Customs regulation protects commercial free speech interests, the Court should interpret the statute so as to uphold the regulation.

It is well settled that the First Amendment protects commercial speech from unwarranted governmental regulation. *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-762 (1976); *see also, Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561-562 (1980). While the Court has held that the Constitution "accords less protection to commercial than to other constitutionally safeguarded forms of expression," *Folger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983), the Court has consistently invalidated restrictions designed to deprive consumers of accurate information about products and services legally offered for sale. *See e.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia Pharmacy Board, supra.*

Because the enforcement of trademark rights could lead to restrictions on truthful commercial speech, courts have recognized that trademark rights should not be construed in a manner that would conflict with First Amendment interests. *See Stop the Olympic Prison v. U.S. Olympic Committee,* 489 F.Supp. 1112, 1124 (S.D.N.Y. 1980). *See also, Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.,* 445 F.Supp. 875, 884 (S.D. Fla. 1978), *aff'd on other grounds,* 626 F.2d 1171 (5th Cir. 1980) (when Copyright Act and First Amendment work at cross-purposes, First Amendment interests prevail). *But see International Olympic Committee v. San Francisco Arts & Athletics,* 789 F.2d 1319 (9th Cir.), *cert. granted,* ____ U.S. ____, 93 L.Ed.2d 280 (1986).

Accordingly, protected commercial speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest. *Central Hudson,* 447 U.S. at 556. In this case, the legislative history reveals a substantial government interest which is served by Section 526 as interpreted by the Customs Service. However, no equivalent substantial governmental interest is furthered by the interpretation of Section 526 offered by the respondents and upheld by the court of appeals. Customs' interpretation of Section 526 protects independent American purchasers of exclusive U.S. trademark rights from the kind of fraud perpetrated by the foreign manufacturer and trademark holder in *Bourgois v. Katzel, supra.* Since *Katzel*-type fraud cannot occur when the U.S. trademark holder and the foreign trademark holder are related parties, no substantial interest is furthered by granting the commonly-owned U.S. trademark holder the right to exclude genuine trademark goods. In fact, as detailed above, granting such a right to commonly-owned trademark holders leads to absurd results. *See infra,* p. 8. Thus, the court of appeals' sweeping interpretation of Section 526 is more extensive than necessary to serve the government's interest.

This Court's recent decision in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* does not undermine this conclusion. ____ U.S. ____, 54 U.S.L.W. 4956

(1986). In *Posadas*, the Court considered a First Amendment challenge to a Puerto Rican statute which restricted casino advertising directed to residents of Puerto Rico. The Court held in a 5-4 decision that the greater power to ban gambling entirely—which the legislature chose not to assert—"necessarily includes the lesser power to ban advertising of casino gambling." 54 U.S.L.W. at 4961.

Unlike *Posadas*, however, the First Amendment commercial speech interests present here are not asserted as a constitutional challenge to the validity of the statute. Instead, the First Amendment interests are useful in determining the reasonableness of the Customs regulation as an interpretation of the statute. Because the regulation minimizes the detrimental effects on First Amendment values that result from a broad reading of Section 526, the Customs regulation is a valid interpretation of the statute. In fact, in *Posadas*, the Court found that it was bound to abide by the narrowing construction given to the statute by the Puerto Rican trial court and approved *sub silentio* by the Supreme Court of Puerto Rico. 54 U.S.L.W. at 4959. Here, the Customs regulation serves the same purpose; it acts as a narrowing construction of the statute and makes the statute more palatable with respect to First Amendment values.[7] Accordingly, since the Customs regulation helps to protect important First Amendment interests, the Court should find that the Customs regulation is a reasonable interpretation of Section 526.

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[7] Moreover, in *Posadas*, the legislature's intent to discourage gambling by its own citizens while simultaneously promoting gambling by tourists was clear and direct. 54 U.S.L.W. at 4960. Here, Congress' intent for the scope of Section 526 is muddied, and therefore, the Customs Service's interpretation of the statute, which protects vital First Amendment interests, deserves substantial weight.

CONCLUSION

For the foregoing reasons, in addition to all those presented by petitioners, the American Free Trade Association respectfully urges that the court of appeals' decision below be reversed.

Respectfully submitted,

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